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IN THE

Supreme Court of the United States

REPUBLICAN PARTY OF MINNESOTA, *et al.*,
Petitioners,

v.

VERNA KELLY, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF OF *AMICUS CURIAE* CONFERENCE OF CHIEF JUSTICES IN SUPPORT OF RESPONDENTS

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STATEMENT OF *AMICUS CURIAE* [1]

The Conference of Chief Justices ("the Conference") is the national voice of the State courts in the United States concerning matters of importance in improving the administration of justice. The Conference is comprised of the Chief Justices from the highest courts of each State, the District of Columbia and the Commonwealths of Puerto Rico and the Northern Mariana Islands, and the Territories of American Samoa, Guam and the Virgin Islands.

The Conference unanimously authorized the filing of an *amicus* brief at its January 2002 meeting, and this brief has been approved by a special committee of the Conference.

The unique challenges of judicial elections have led to special efforts by Chief Justices from States in which members of the judiciary face election. In December 2000, the Chief Justices from the seventeen most populous such States convened a Summit, chaired by Chief Justice Thomas R. Phillips of Texas, on Improving Judicial Selection. In January 2001, a Call To Action was issued stating the Summit's recommendations. *See Call To Action*, 34 Loy. L.A. L. Rev. 1353 (2001). Among those recommendations were two that dealt with the Canons on judicial campaign activity. The Summit urged that a Symposium on Judicial Campaign Conduct be held to "reexamine [the Canons] to assure that they promote fair elections while safeguarding the right to free speech." That Symposium, chaired by Chief Justice Randall T. Shepard of Indiana and co-hosted by seven other Chief Justices, was held in November 2001; a statement

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[1] The brief is filed with the consent of all parties, as indicated by letters of consent filed with the Court. This brief was not authored, in whole or in part, by any counsel for any party. No one other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

of recommendations is in process.[2] For the Summit and Symposium, staff services were provided by the National Center for State Courts, which regularly provides such support for the Conference (and other organizations).

In short, a substantial number of the members of the Conference, working through the National Center for State Courts, have been acting together to study and recommend steps to address the complex issues presented by judicial elections.

SUMMARY OF ARGUMENT

The Conference does not take any position on the language of the announce clause of the Minnesota Judicial Canon, or any other Canon. The Conference urges this Court to decide the case in a way that preserves the States' flexibility to balance First Amendment concerns against other constitutional commitments to the Due Process rights of litigants and the independence of the judiciary within a system of separated government powers. Because this Court's decision could affect the conduct of judicial elections in thirty-nine States, the precise contours of its opinion will have national significance.

First, for well over a century, the States have worked to structure judicial elections so that judges could be selected by voters without impairing the traditional role of an independent and impartial judiciary. States adopting elections for the judiciary did so, in fact, to enhance their independence. Moreover, the thirty-nine States that select at least some of their judges by election[3] have implemented an array of

[2] The Symposium papers will appear in 77 Ind. L.J. in the Spring of 2002.

[3] In seven States, no judges face elections; in four, probate judges are elected (Connecticut, Maine, South Carolina and Vermont). Hereafter, we put aside those eleven States and address the thirty-nine others. *See* our Appendix and A.B.A. Rep. & Recommendations of the Task Force on Lawyers' Political Contributions (pt. 2) app. 2 at 69-76 (1998) (hereinafter "ABA Task Force Report") for a listing of the thirty-nine States with

measures, through constitutional provisions, codes of conduct and otherwise, designed specifically to preserve for the judiciary its traditional role even as judges are required to stand for election. Contrary to the suggestion of other *amici*, the choice before the States has not been one between elections conducted like all others, without reasonable and meaningful limits, or no elections at all. History shows that having adopted elections, States are unlikely to eliminate them, but pursue instead "innovation and experimentation," *see Gregory v. Ashcroft*, 501 U.S. 452, 458 (1991), in balancing the competing constitutional values. The States' historic commitment to this balance merits careful consideration from this Court.

Second, the right the Due Process Clause provides litigants to unbiased, impartial, open-minded judges, both as a matter of fact and as a matter of perception, must be carefully weighed along with the First Amendment rights presented in this case. *See* Randall T. Shepard, *Campaign Speech: Restraint and Liberty in Judicial Ethics*, 9 Geo. J. Legal Ethics 1059 (Summer 1996). While some lower courts have referred to impartiality as a compelling state interest, few explicitly recognize the constitutional dimension of the interest embodied within the Due Process Clause, and most simply ignore it. Petitioners and some *amici* acknowledge the constitutional nature of the state interest but suggest that the Due Process Clause is violated only when a judge should

elections. Nationally, 86.9% of state judges face elections of some type; 53% of appellate judges and 77.3% of trial judges (general jurisdiction) face contestable elections. *Id.* at 3 n.1 (based on 1998 and 1996 sources).

Our Appendix, based on the ABA Task Force Report, *supra*, app. 1, shows just which States have what system(s). This shows that: among the thirty-nine States, nineteen have retention elections (in seven, for all judges). Contestable elections occur in thirty-three States: twenty have nonpartisan elections (in twelve, for all judges), and sixteen have partisan elections (in seven, for all judges); three of those States have both nonpartisan and partisan elections (Idaho, Indiana and North Carolina).

have stepped aside, but did not, in a specific case based on particular statements made during a campaign. This suggestion, however, is underinclusive as some judicial speech may violate the State's interest in an impartial judiciary even if it does not violate a particular litigant's due process rights. In contrast, the States should be permitted to focus on preventing disqualification problems in the first instance. The Conference urges that this Court focus on the perspective of the States in structuring their judicial systems in deciding the case.

Third, the issue in this case presents squarely the role of judicial independence within state constitutional provisions for the separation of governmental powers as well as checks and balances. Only an independent judiciary, unencumbered by commitments to popular majorities, is able to discharge its historic constitutional obligations, including review of legislative actions produced by those same majorities. As this Court has recognized the "fundamental tension" between the requirements of an independent judiciary and the demands of electoral politics, *see Chisom v. Roemer*, 501 U.S. 380, 400 (1991), so have the States acknowledged this tension and the differences between the work of legislators and the work of judges that underlies it. By enacting reasonable limits on judicial campaign conduct and speech, States have sought to strike a balance among the different constitutional pressures at work within a judicial elective process. The need for such limits has become increasingly evident under the "realities" of modern judicial campaigns,[4] as judicial candidates come

[4] *See Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 477 (2001); Anthony Champagne, *Television Ads in Judicial Campaigns*, 77 Ind. L.J. (forthcoming 2002) (presented at November 2001 Symposium on Judicial Campaign Conduct and the First Amendment); Thomas R. Phillips, *Comment on Judicial Independence and Accountability*, 61 Law & Contemp. Probs. 127, 130 (Summer 1998).

under pressure to win office with commitments, express or clearly implied, on the controversial political and legal issues of the day.

ARGUMENT

I. THE STATES HAVE HISTORICALLY IMPLEMENTED A VARIETY OF MEASURES TO PROVIDE FOR JUDICIAL ELECTIONS WHILE PRESERVING THE DISTINCTIVE ROLE OF THE JUDICIARY.

This Court has recognized "a fundamental tension between the ideal character of the judicial office and the real world of electoral politics," *Chisom v. Roemer*, 501 U.S. 380, 400 (1991), and the States, while choosing to hold judicial elections, have been mindful of that tension. They have striven consistently and with care to balance judicial accountability with judicial independence and impartiality. The Conference urges this Court to bear in mind the impact its decision will have on the States' historic efforts to handle the unique challenges state judicial elections present.

Between 1846 and 1860, twenty-one States had constitutional conventions, nineteen of which chose elections, with only Massachusetts and New Hampshire holding out.[5] It is not correct that the choice of elections was "an unthinking 'emotional response' rooted in . . . Jacksonian Democracy" which somehow "assumed that popular election of judges constituted a radical measure intended to break judicial power through an infusion of popular will and majority control." Kermit L. Hall, *The Judiciary on Trial: State Constitutional*

[5] By 1860, twenty-one of our thirty States elected judges. See Kermit L. Hall, *The Judiciary on Trial: State Constitutional Reform and the Rise of an Elected Judiciary, 1846-1860*, 44 Historian 337 (1983) for a discussion of the history of judicial elections. *See also* Caleb Nelson, *A Re-evaluation of Scholarly Explanation for the Rise of the Elective Judiciary in Antebellum America*, 37 Am. J. Legal Hist. 191 (1993).

Reform and the Rise of an Elected Judiciary, 1846-1860, 44 Historian 337, 338-39 (1983). On the contrary, the move to judicial elections was led by moderate lawyer-delegates to increase judicial independence and stature. Their goal was a judiciary "free from the corrosive effects of politics and able to restrain legislative power." *Id.*

Moderate reformers built consensus among delegates by adopting constitutional devices designed to limit the potentially disruptive consequences of popular election. *Id.* at 342, 352. For example, provisions rendering judges ineligible to run for other offices while serving on the bench were intended to prevent the political use of judicial office to win other offices. Staggered terms for appellate judges were aimed at averting sweeping changes in the composition of the courts resulting from increased "party feeling" in a particular election. These measures and others, such as longer terms and "retention" elections, served the goal of restricting the "impact of party and majority rule." *Id.* at 352.

The constitutions of the thirty-nine States in which judges face elections of some type have an array of such provisions, unique to the judiciary, to accommodate the choice of popular selection with the constitutional value of judicial independence. *See, e.g.*, P. App. 37a n.18. Most would be unthinkable for other elected officials in the legislative and executive branches. In all thirty-nine States (except Nebraska), judges' terms are longer than any other elective officials'.[6] In thirty-

[6] *See, e.g.*, Ariz. Const. art. 6, § 4; Cal. Const. art. 6, § 16; Ga. Const. art. 6, § 7 ¶ I; Ill. Const. art. 6, § 10; Mich. Const. art. VI, § 2; Minn. Const. art. 6, § 7; N.Y. Const. art. 6, § 2; Ohio Const. art. IV, § 6; Tex. Const. art. 5, § 2. Here and in notes 6-10, all citations are to constitutional provisions; no statutory provisions are included.

Of appellate judges who face elections, 38.5% have terms of ten to fifteen years and another 60.6% have six to eight year terms. Of trial judges who face elections, 13% have terms of ten to fifteen years, and another 67.6% have six to eight year terms. Citizens for Independent Courts, *Uncertain Justice: Report of the Citizens for Independent Courts Task Force on Selecting State Court Judges* 77, 90-92, 116-17 (2000).

seven of these States, only judges are subject to both impeachment and special disciplinary process.[7] In thirty-three, judges are the only elective state officials subject to requirements of training and/or experience (except that in ten of those, the attorney general is subject to similar requirements).[8] In twenty-three, only judges are subject to mandatory age retirement.[9] In twenty-one, only judicial nominations go through nominating commissions; in six States, this applies even to interim appointments.[10] Last, in eighteen States, only judges cannot run for a nonjudicial office without first resigning.[11]

This pattern shows that the choice of elections, "while perhaps a decision of questionable wisdom, does not signify the abandonment of the ideal of an impartial judiciary carrying out its duties fairly and thoroughly." *Stretton v. Disciplinary Bd.*, 944 F.2d 137, 142 (3d Cir. 1991). The thirty-nine States have recognized that, far from fulfilling the historic purpose in allowing for the popular election of

[7] *E.g.*, Ariz. Const. art. 6.1, § 3; Cal. Const. art. 6, § 18(d); Ga. Const. art. 6, § 7 ¶ VI; Ill. Const. art. 6, § 15(b); Mich. Const. art. VI, § 30; Minn. Const. art. 6, § 9; N.Y. Const. art. 6, § 22; Ohio Const. art. VI, § 17; Tex. Const. art. 5, § 1-a.

[8] *E.g.*, Ariz. Const. art. 6, § 6; Cal. Const. art. 6, § 15; Ga. Const. art. 6, § 7 ¶ II; Ill. Const. art. 6, § 11; Minn. Const. art. 6, § 5; N.Y. Const. art. 6, § 20; Tex. Const. art. 5, § 2.

[9] *E.g.*, Ariz. Const. art. 6, § 39; Cal. Const. art. 6, § 20; Ill. Const. art. 6, § 15(a); N.Y. Const. art. 6, § 25; Ohio Const. art. IV, § 6(c); Tex. Const. art. 5, § 1-a(1).

[10] *E.g.*, Ariz. Const. art. 6, § 37; Cal. Const. art. 6, § 7; Ky. Const. art. III, § 118(2) (with interim appointments included); N.M. Const. art. VI, § 35 (with interim appointments included); N.Y. Const. art. 6, § 2(c).

[11] *E.g.*, Ariz. Const. art. 6, § 28; Cal. Const. art. 6, § 17; Ill. Const. art. 6, § 13(b); Mich. Const. art. VI, § 21; Minn. Const. art. 6, § 6; N.Y. Const. art. 6, § 20(b)(1); Ohio Const. art. IV, § 6(b).

judges, any effort to treat judicial elections like others wholly undermines the judiciaries' independent role under their constitutions. Their balanced approach to the proper structure for an elected judiciary embodies the understanding that

> the word "representative" connotes one who is not only *elected by* the people, but who also, at a minimum, *acts on behalf of* the people. Judges do that in a sense—but not in the ordinary sense. . . . [T]he judge represents the Law—which often requires him to rule against the People.

Chisom, 501 U.S. at 410-11 (Scalia, J., dissenting).

Contrary to the suggestion of one petitioner and one of the *amici*, *see* Pet'r Republican Party of Minnesota Br. at 38-39; Idaho Conservation League and Louisiana Environmental Action Network Br. at 7-23, this case does not present the Court with a choice between forcing States to conduct judicial elections like all other elections, and prohibiting judicial elections altogether. The voters in these States have generally rejected efforts to dismantle judicial elections, choosing to maintain in place judicial election processes which have historically included safeguards to protect the traditional role of the judiciary.[12] There is no support for the proposition that the electorate has viewed the choice as one between legislative-type elections or no elections at all. Any

[12] In 1906, when Roscoe Pound gave a landmark address to the ABA, roughly fourteen percent of our state judges faced no elections. Roy A. Schotland, *Summit on Improving Judicial Selection: Personal Views*, 34 Loy. L.A. L. Rev. 1361, 1367 (2001). Today that number stands at thirteen percent. *Id.* A failed attempt to abandon the elective system in Florida exemplifies its resiliency. In 2000, for example, Florida voters faced a ballot proposition to decide whether their trial judges should continue to run in nonpartisan, contestable elections, or should instead be subject to merit appointments with subsequent retention elections. The change was defeated in every circuit and in every county. Roy A. Schotland, *Financing Judicial Elections 2000: Change & Challenge*, 2001 L. Rev. M.S.U.-D.C.L. 1, 37-41 (forthcoming).

suggestion to the contrary assumes, improbably, that voters, by choosing elections, have chosen also to have a judiciary transformed radically in character. For these reasons, States will continue to conduct elections while continuing also to grapple with the challenges those elections present for an independent and impartial judiciary.

II. DUE PROCESS REQUIRES JUDGES WHO WILL "HOLD THE BALANCE NICE, CLEAR AND TRUE."[13]

Petitioners agree with the Eighth Circuit's conclusion that "a judge's ability to apply the law neutrally is a compelling governmental interest of the highest order." Pet'r Republican Party of Minnesota Br. at 4 (citing P. App. 21a). They acknowledge "the due process clause of the United States Constitution sets the floor." *Id.* at 18. "Due process," they admit, "requires trial before an unbiased judge." *Id.* (citation omitted). The Conference concurs.

Petitioners and some of their *amici* suggest, however, that the due process analysis should only be considered on a case-by-case basis, involving the standards and process of disqualification. *Id.* at 19-21; American Civil Liberties Union Br. at 16-18; Public Citizen Br. at 6-7. Yet, if a judge steps down from any case involving a campaign promise, the voters do not get what they believe they were promised. Petitioners' retrospective approach further imposes on litigants burdens and risks, and imposes on the judicial system both avoidable litigation and the potential loss of many judges' services. In contrast, States with judicial elections sensibly choose to structure those elections to protect guarantees under the Due Process Clause for all litigants rather than subjecting litigants to the burdens and inefficiencies of post-election disquali-

[13] *Tumey v. Ohio*, 273 U.S. 510, 532 (1927).

fication or recusal [14] procedures. In short, disqualification is inadequate because it does not protect the State's interest in an impartial judiciary, an interest that parallels but is separate from the interests of particular litigants.

At stake in this case is how much flexibility the States and their supreme courts (judges regulating other judges) will have in regulating their own judges. This Court has recognized that there "could hardly be a higher governmental interest than a State's interest in the quality of its judiciary." *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 848 (1978). The Due Process Clause's guarantee of impartial judges, both as a matter of fact and as a matter of perception, is a compelling state interest. The dissent in the Eighth Circuit (and other lower courts and some *amici*) overlooked the due process rights to a fair trial before an impartial tribunal as a compelling state interest. P. App. 92a-93a ("must give way before rights which, *unlike the court's policy*, have been constitutionally secured") (emphasis added).

A. States Must Have Latitude to Address the Serious Due Process Issues Presented by Judicial Candidate Speech, and Cannot Rely on Disqualification Procedures Alone.

This Court has repeatedly recognized that judicial bias, or even the appearance of bias, violates the Due Process Clause. *Concrete Pipe & Products v. Constr. Laborers Pension Trust*, 508 U.S. 602, 617 (1993) ("due process requires a 'neutral and detached judge in the first instance'" (citing *Ward v. Village of Monroeville*, 409 U.S. 57, 61-62 (1972)); *Aetna Life Ins. Co. v. Lavoie*, 475 U.S. 813, 822 (1986) (Due Process Clause

[14] While traditionally "disqualification" was involuntary and "recusal" voluntary, in modern practice the terms "are frequently viewed as synonymous and often used interchangeably." Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, § 1.1, at 4-5 (Little, Brown & Co. 1996).

violated when judge had "direct, personal, substantial, pecuniary" interest in outcome); *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980) ("no person will be deprived of his interest in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him"); *Ward*, 409 U.S. at 59-60 (Due Process Clause offended when system tempts "average man as a judge . . . not to hold the balance nice, clear and true" (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1927))); *Johnson v. Mississippi*, 403 U.S. 212, 216 (1971) ("Trial before an 'unbiased judge' is essential to due process" (citing *Bloom v. Illinois*, 391 U.S. 194, 205 (1968); *Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971))); *In re Murchison*, 349 U.S. 133, 136 (1955) ("A fair trial in a fair tribunal is a basic requirement of due process. . . . [O]ur system has always endeavored to prevent even the probability of unfairness . . . [even though this may] sometimes bar trial judges who have no actual bias, and who would do their very best to weigh the scale of justice between contending parties."); *Offutt v. United States*, 348 U.S. 11, 14 (1954) ("justice must satisfy the appearance of justice"); *Tumey*, 237 U.S. at 523 (it "violates the Fourteenth Amendment, and deprives a defendant in a criminal case of due process of law, to subject his liberty or property to the judgment of a court the judge of which has a direct, personal, substantial pecuniary interest in reaching a conclusion against him in this case").

This Court has made clear that the contours of the Due Process Clause in this context "cannot be defined with precision," and that a "reasonable formulation of the issue is whether the 'situation is one which would offer a possible temptation . . . to the average . . . judge to . . . lead him not to hold the balance nice, clear and true.'" *Aetna*, 475 U.S. at 825 (citing *Ward*, 409 U.S. at 60). Because the judicial interest "cannot be defined with precision," *id.*, this Court should give latitude to the States and their supreme courts who are attempting to structure court systems to effectively

address the questions of impartiality that imperil the rights of litigants under the Due Process Clause.[15]

While due process is a necessary part of a fair and impartial trial, "it is not a right that lends itself to a fixed or immutable definition." Richard E. Flamm, *Judicial Disqualification: Recusal and Disqualification of Judges*, § 2.3.2, at 33 & n.13 (Little, Brown & Co. 1996). "Though impartial judges are constitutionally mandated and the due process clause sets a standard for judicial impartiality below which no judge is constitutionally permitted to fall, judicial disqualifications are rarely made on due process grounds." *Id.* § 2.3.3, at 33-34 & n. 17 (citing, *inter alia*, *Aetna*, 475 U.S. at 820). States may, of course, impose more rigorous judicial disqualification standards than due process requires. *Id.* at 34 & n.19 (citing, *inter alia*, *Aetna*, 475 U.S. at 828; *FTC v. Cement Inst.*, 333 U.S. 683, 702 (1948); *Tumey*, 273 U.S. at 523). Such efforts are "to promote public confidence in the integrity of the judicial process." *Id.* at 36 & n.19 (citing, *inter alia*, *Liljeberg v. Health Servs. Acquisition Corp.*, 486 U.S. 847, 860 (1988)). The public confidence in the impartiality of judges has constitutional dimensions, *id.* at 36 n. 34 (citing *Liljeberg*, 486 U.S. at 865 n.12), not addressed by Petitioners.

Disqualification procedures are insufficient. *See* Shepard, *supra*, at 1082. Recusal does not help the litigant who is unaware of the judge's statements, and often the litigant bears the expensive and time-consuming burden of raising and litigating the question of recusal. Recusal also imposes costs

[15] For example, since 1995 Ohio has taken official steps to promote constructive judicial campaigns and reduce the likelihood of problematic conduct. *See* Richard A. Dove, *Judicial Campaign Conduct: Rules, Education, and Enforcement*, 34 Loy. L.A. L. Rev. 1447, 1456-57, 1460-61, 1463-64 (2001). All judicial candidates must attend a special course early in the campaign year, and special panels of judges and an expedited hearing process are in place to deal with problematic conduct if it occurs. *See id.*

and delays on the public and other litigants as cases are shuffled from court to court. Moreover, recusal does not serve the voters who elected a judge based on her stated views. Finally, a reliance on recusal would permit a judicial candidate to offer up whatever view seemed to get the most votes or the most contributions, with full knowledge that the candidate would never have to stand by it as a judge. Impartiality is thus secured only by a form of electoral fraud, which could entail also ethical violations for deliberate misrepresentations in the course of a campaign.

Courts facing disqualification issues presented in this context are generally reluctant to probe into election-related influence or motivation. *See, e.g., Nevius v. Warden*, 960 P.2d 805, 810 (Nev. 1998) (Springer, C.J., dissenting) ("Judges should be judging crime, not 'fighting' crime"); *State v. Kinder*, 942 S.W.2d 313, 321-22 (Mo. 1996) (not willing to disqualify a trial court judge who six days before presiding over a capital trial of a black defendant, and who faced election later that year, issued a press release announcing a decision to switch political parties claiming that his prior party had "place[d] far too much emphasis on . . . people with a skin that's any color but white" and he expressed opposition to "reverse-discrimination quotas and affirmative action"). Precisely to avoid such situations, States have been unwilling to rely on disqualification to address the impact of campaign activity on due process guarantees.

B. Judicial Candidate Speech on Political or Legal Issues Likely to Come Before Courts Carries a High Risk of Improper Prejudgments or Commitments, Whether Express or Implied, in Violation of Due Process Guarantees.

When a judicial candidate speaks out on disputed legal or political issues that may come before him, the electorate reasonably uses those statements to form expectations about the treatment of issues likely to come before that judge.

There is, in fact, no other reason why a judicial candidate would offer such statements in the course of the campaign, nor any other use that voters would make of them. Numerous *amici* acknowledge this point. *See, e.g., Amici Curiae* [Two] State Supreme Court Justices Br. at 23-24; *Amicus Curiae* Chamber of Commerce of the United States Br. at 5-7. As a result, campaign statements about the candidate's views on issues likely to come before the court leave litigants facing a judge who, at worst, is actually biased or who, at best, cannot provide the appearance of impartial justice. Judicial canons limiting campaign conduct attempt to limit the circumstances in which a due process problem of this magnitude could result.

Rejecting a First Amendment challenge to such a Canon, the Third Circuit stated:

> If judicial candidates during a campaign prejudge cases that later come before them, the concept of impartial justice becomes a mockery. The ideal of an adjudication reached after a fair hearing, giving due consideration to the evidence produced by all parties no longer would apply and the confidence of the public in the rule of law would be undermined.

Stretton, 944 F.2d at 142.

Even if candidates argue—much less believe in good faith—that they can wipe the slate clean of campaign promises to decide a case, "the requirement of due process . . . is not satisfied by the argument that men of the highest honor and the greatest self-sacrifice could carry it on without danger of injustice." *Tumey*, 273 U.S. at 532. Due process guarantees more than a possibility that a judge would back down from his public statements if convinced to do so. In the current climate of judicial elections, there is a strong influence on a judge to stand by campaign statements on which he staked his hopes of victory—and behind which he would have to stand in seeking reelection. Under the worst

circumstances, such a campaign "promise" is like "a bribe offered to voters, paid with rulings consistent with that promise, in return for continued employment as a judge." Shepard, *supra*, at 1088.

Canons limiting judicial candidate campaign conduct are "straightforward" regulations of expression that do not discriminate in favor of one viewpoint or another. They do not suppress ideas or seek to control political opinions. *See United States Civil Serv. Comm'n v. Nat'l Ass'n of Letter Carriers*, 413 U.S. 548, 564 (1973).

A hypothetical campaign promise made in the most literal sense, such as "I will impose the maximum sentence in every drunk driving case," commits the candidate to a result regardless of the applicable laws or the facts presented. The canon protects accused drunk drivers from a predisposed judge, who cannot, by virtue of a campaign promise, fulfill the duty to consider all the relevant sentencing factors, including, for example, the accused's prior record, property damage or personal injury, and the proven blood alcohol level. A judge's failure to consider these factors could warrant reversal and would certainly violate the defendant's due process rights. Shepard, *supra*, at 1093; *see also* Robert M. O'Neil, *The Canons in the Courts: Recent First Amendment Rulings*, 77 Ind. L.J. (forthcoming 2002) (presented at November 2001 Symposium on Judicial Campaign Conduct and the First Amendment).

Courts reviewing the efforts of States to limit judicial campaign activity have historically been sensitive to First Amendment rights affected by these limitations. For example, the district court, the Eighth Circuit, and now the Minnesota Supreme Court have construed the announce clause before this Court to apply only to statements displaying a pre-disposition on issues likely to come before the elected judge. *See, e.g.*, P. App. 52a-53a; 128a. The Conference urges this Court to respect the difficult but

essential balance that States have labored to achieve and that lower courts have, by and large, approved, in some instances with the aid of narrowing constructions. P. App. 53a-56a.

Judicial canons limiting statements by judicial candidates that indicate or suggest bias, if applied with proper, limiting construction, lead to the right result: they protect the due process rights of litigants by preventing judicial candidates from acquiring an improper interest in the outcome of litigation, and by preventing the appearance of such an interest. The prevention of actual and apparent judicial bias, recognized by the Eighth Circuit here and by other circuits in *Stretton* and *Buckley v. Ill. Judicial Inquiry Bd.*, 997 F.2d 224, 228 (7th Cir. 1993), is the same interest that this Court has protected under the Due Process Clause. The right to an impartial judge, guaranteed by the Due Process Clause, is a compelling governmental interest. The best approach to resolving challenges to canons regulating judicial campaigns is to accommodate as much speech by judicial candidates as the Due Process Clause permits, viewed from the context of States', and their supreme courts', attempts to structure their judicial systems to avoid these difficulties. *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 400 (2000) (Breyer, J., concurring) ("this is a case where constitutionally protected interests lie on both sides of the legal equation.").

III. THIS CASE RAISES ISSUES CENTRAL TO STATE EFFORTS TO PROTECT THE INDEPENDENCE AND DISTINCT ROLE OF THE JUDICIARY UNDER STATE CONSTITUTIONAL SCHEMES OF SEPARATED POWERS.

A. The "Basic Principle" of Separated Powers Compels Close Attention to the Effect of Elections on Judicial Independence.

Petitioner Minnesota Republican Party argues that "this case is not about judicial independence." Pet'r Minnesota Republican Party Br. at 8. Moreover, neither Petitioners nor

any *amici* even refer to state constitutional frameworks of separated powers which depend in substantial measure on the protection of that independence. The Conference respectfully suggests, however, that the question before this Court involves in the most fundamental way these profound constitutional concerns.

Certainly the court below correctly appreciated the States' understanding that limitations on judicial campaign conduct and speech, taken together with other constitutional and statutory procedures for the conduct of judicial elections, "are designed in large part to protect the independence of the State's judiciary." *See* P. App. 25a. Attending closely to the requirements of judicial independence, the States have properly kept in view the "basic principle" of separation of powers which compels "allocating specific powers and responsibilities to a branch fitted to the task." *Loving v. United States*, 517 U.S. 748, 757 (1996).

The separation of powers doctrine requires, in practical application, "an analysis of governmental functions," W.B. Gwyn, *The Meaning of the Separation of Powers* 26 (1965), and sensitivity to the maintenance of the checks and balances necessary to protect each branch of the government from "encroachment and aggrandizement" by another. *Mistretta v. United States*, 488 U.S. 361, 381 (1989). No principle has more centrally shaped organization of state governments and in particular the relationships between and among their branches. Rooted in pre-Revolutionary political thought that cast the mold for the federal and state constitutions to follow, *see* Bernard Bailyn, *The Ideological Origins of the American Revolution* 74 (1967), the doctrine of separated powers for the judicial, executive and legislative branches came quickly to define for States "the very characteristic of the American political system." Gordon S. Wood, *The Creation of the*

American Republic 1776-1787 151 (1969). State constitutions throughout the country, like Minnesota's, reflect the centrality of this commitment.[16]

In choosing judicial elections, States have not abandoned their concern with preserving fully separated powers. The States know that if candidates for judicial office appeal for voters' support on the same basis as legislative candidates—if they answer to the same electoral majorities—the courts run the grave risk of becoming second legislatures. As electoral twins to the legislatures, courts would stand to lose the essential independence required for them to discharge their high constitutional duty of judicial review. *See, e.g., Cooper v. Aaron*, 358 U.S. 1, 18 (1958); *Marbury v. Madison*, 5 U.S. 137, 177 (1803). For this reason, States in the early Republic acted to establish that independence, expecting that the judiciary could only then provide the necessary "check" on legislative excess fueled by popular passion. *See* Wood, *supra*, at 404, 451.[17] Since that time, States—including States with judicial elections—have remained vigilant in protecting that independence, adopting a variety of measures to secure it. *See supra* Part I.

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[16] Thus Article 3, Section 1, of the Minnesota Constitution states that "[T]he powers of government shall be divided into three distinct departments: legislative, executive and judicial. No person or persons belonging to or constituting one of these departments shall exercise any of the powers properly belonging to either of the others except in the instances expressly provided in this constitution." Minn. Const. art. 3, § 1 (2000).

[17] James Madison illustrated the general principle a different way, by opposing a proposal that would have facilitated the conduct of constitutional conventions as a means of checking governmental abuse. Madison objected that the proposal would have conferred an undue advantage on the legislature, whose members, skilled in the electoral arts, would have the advantage in seeking election to the constitutions. Because "the same influence which had gained them an election into the legislature would gain them a seat in the convention," the convention could not effectively act as a check on legislative excess. The Federalist No. 49, at 316 (James Madison) (Clinton Rossiter ed.).

Judicial review, unburdened by undue popular pressures, is necessary to assure that a majority "united by a common interest" does not threaten the rights of the minority. The Federalist No. 51, at 324 (James Madison) (Clinton Rossiter ed.). This Court has recognized, for example, the role of "searching judicial inquiry" where legislation reflects "prejudice against discrete and insular minorities . . . which tends seriously to curtail the operation of the political processes ordinarily to be relied upon to protect minorities." *United States v. Carolene Prods.*, 304 U.S. 144, 153 n.4 (1938). This is valued even when popular majorities effect their will directly by referendum or initiative. *See, e.g., Evans v. Romer*, 854 P.2d 1270, 1285 (Colo. 1993) (Constitutional amendment impermissibly "fenced out" from participation in the political process "an independently identifiable group."), *aff'd*, 517 U.S. 620 (1996).

These same concerns apply beyond constitutional judicial review, to routine review of agency action. "Policy arguments," as this Court has made clear, "are more properly addressed to legislators or administrators, not to judges." *Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837, 864 (1983). *Chevron* principles hold true for state courts. State courts, like federal courts, must proceed in reviewing agency action with the understanding that "[j]udges are not experts in the field, and are not part of either political branch of the Government," and that the resolution of the issues before them must not depend on "their personal policy preferences." *Chevron*, 467 U.S. at 864. Because judicial candidates, like other candidates, come under pressure to place personal "preferences" front and center before the voters, States impose limits on judicial candidate speech to defend the boundaries of judicial decision-making.

Some *amici* before this Court, stressing the policy-making role of state courts in common law adjudications, *see, e.g., Gregory v. Ashcroft*, 501 U.S. 452, 466 (1952), contend that judges must be free in this circumstance to abandon the

chambers for the hustings, or to rule from the bench with a close eye on the voter. *See Amici Curiae* [Two] State Supreme Court Justices Br. at 4 (A state's adoption of an elective system "suggests that a certain degree of political responsiveness [by elected judges] is not only permissible, but is an intrinsic and expected element of the elective judicial role."). This suggestion is profoundly mistaken. The courts do not engage in common law adjudication as surrogates for the legislature. Legislators attend closely to the will of voters on election day, and to the direct imprecation of interest groups and constituents at all other times. Judges decide the cases before them by presiding over a distinctive adversarial process and making a disciplined use of the tools of their craft to decide impartially based upon the evidence and the applicable law.

The States have sought to protect the judiciary in the performance of its independent function through various constitutional provisions, statutes and rules. *See supra* Part I. The Supreme Court of Minnesota has carefully considered the efforts of that State, concluding that "[w]hile the framers of our state constitution have developed a system of selection and election quite different from that federal scheme, they, too, designed a plan to recognize the uniqueness and independence of the state judiciary." *Peterson v. Stafford*, 490 N.W.2d 418, 420 (Minn. 1992), *cert. denied*, 507 U.S. 1033 (1993), *quoted in* P. App. 108a. The design of Minnesota's plan necessarily involved complex choices that the States and the federal government have always faced in preserving the judicial independence within constitutional arrangements of separated powers. *See, e.g.*, Gerhard Casper, *Separating Power* 152 (1997). Yet in Minnesota and elsewhere, there is broad agreement—even among jurists who favor an elective process—that to protect judicial independence, states need "clear and reasonable rules for judicial campaign behavior." *See, e.g.*, Shirley S. Abrahamson, *The Ballot and the Bench*, 76 N.Y.U. L. Rev. 973, 1003 (2001).

B. Courts Have Long Recognized the Tension between Independence and Electoral Accountability in Seeking to Preserve the Distinctive Role of the Judiciary.

1. *The Precedents Acknowledge the Unique Issues Elective Systems- Present For the Judiciary.*

This Court has noted the "fundamental tension between the ideal character of the judicial office and the real world of electoral politics." *Chisom*, 501 U.S. at 400. The lower courts, while disagreeing on outcomes, have concurred on the challenge presented by that "fundamental tension." They have agreed in particular about the source of the problem: that the role of the judge is fundamentally different from that of the legislator, and that this fundamental difference shapes the issues raised by their respective candidacies for elective office. This Court has summarily affirmed, for example, a lower court ruling that the Equal Protection Clause of the Constitution does not mandate the application of the "one man, one vote" apportionment doctrine to judicial elections. The lower court in that case specifically concluded that:

> [T]he one man-one vote doctrine, applicable as it now is to selection of legislative and executive officials, does not extend to the judiciary. Manifestly, judges and prosecutors are not representatives in the same sense as are legislators or the executive. Their function is to administer the law, not to espouse the cause of a particular constituency.

Wells v. Edwards, 347 F. Supp. 453, 455 (M.D. La. 1972) (citing *Stokes v. Fortson*, 234 F. Supp. 575, 577 (N.D. Ga. 1964)), *aff'd*, 409 U.S. 1095 (1973).

Other lower courts have unanimously adopted this understanding of the core differences between legislators and judges. *See Buckley*, 997 F.2d at 228 ("Judges remain different from legislators and executive officials, even when

all are elected, in ways that bear on the strength of the state's interest in restricting their freedom of speech."); *Stretton,* 944 F.2d at 142; *Morial v. Judiciary Comm'n,* 565 F.2d 295, 305 (5th Cir. 1977).

Indeed, the differences acknowledged by the courts between the work of legislators and that of judges are vast, bearing directly on the fundamental differences in the "political" responsiveness appropriately expected from them by their "voters" and "constituents." Elected legislators are free to meet—at any time, openly or privately—with their constituents or others affected by their action in pending or future matters who enjoy a guaranteed constitutional right of petition. In contrast, judges are insulated from contact with the parties to a matter before them by both norms and legal restrictions on ex parte contacts.[18] Unlike legislators, judges cannot build support through constituent casework, patronage or securing benefits for their communities. Other elected officials expect and typically face competition, but few judges do.[19] While elected legislators may and do pledge to change law and, if elected, often work reservedly toward change, judges may not. Judges, to the contrary, are expected to approach with restraint issues of great societal or political

[18] *See, e.g.,* Minn. Stat. Ann., Code of Judicial Conduct, Canon (3)(A)(7) (2001); *see also McKenzie v. State*, 583 N.W.2d 744, 748 (Minn. 1998) ("[c]learly a judge may not discuss a trial with one party unless the opposing party is present").

[19] *See, e.g.,* Chief Justice Thomas R. Phillips, Address to the Joint Session of the 73d Legislature of Texas 5 (Feb. 23, 1993) ("[O]ver eighty percent [of Texas's 481 judges sitting in 1993] were unopposed in both the primary and general election when they first sought reelection. . . . [O]f those . . . who initially reached the bench by appointment . . . fifty-five percent have never had an opponent . . . either in a primary or a general election."); *see also* Melinda Gann Hall, *Competition in Judicial Elections, 1980-1995* table 2 at 20 (Sept. 1998) (unpublished paper delivered at 1998 American Political Science Association annual meeting) (stating that forty-eight percent of incumbent justices are not challenged).

import; to this end they employ "devices for disposing of a case while avoiding judgment on the constitutional issues it raises," which include the doctrines of standing, vagueness and ripeness. *See* Alexander Bickel, *The Least Dangerous Branch* 17, 117-18, 143, 150, 169 (Bobbs-Merrill 1957).[20]

The politics of the legislative elective process turns on commitments, unfettered dialogue and responsiveness, and it does not end with election, but continues beyond, in the day-to-day conduct of legislative office. The politician who won the election is a politician still afterward, free to cultivate and reward support by working with his supporters to advance shared objectives. And because elected officials act in ways that may directly affect large numbers of people, those affected may, in turn, resort to political safeguards. *See Minn. State Bd. v. Knight*, 465 U.S. 271, 283-87 (1984). But a judge, once elected, must behave as a judge—acting, as an arbiter, neutrally toward the identifiable and limited number of parties in each case. Those parties, typically the only ones affected by the judge's actions, have no safeguard except the judge's commitment to taking action only on the facts and the law.

It is in light of these differences that the role of the judge-as-political-candidate presents challenges for both the candidate and the State seeking to preserve the essential attributes of the judiciary. Petitioner Minnesota Republican Party concedes that, as the Eighth Circuit below stated the case, "it is consistent with the essential nature of campaigns for

[20] Blackstone's comments on equity–the correction of deficiencies in the law–explain the philosophical underpinnings of the idea:

> [T]he liberty of considering all cases in an equitable light must not be indulged too far, least thereby we destroy all law, and leave the decision of every question entirely in the breast of the judge. . . . [E]quity without law . . . would make every judge a legislator, and introduce most infinite confusion.

George Sharswood, ed., *Blackstone's Commentaries on the Laws of England* 60 (Childs & Peterson 1860).

legislative and executive offices for candidates to detail and make promises about the programs that they intend to enact into law and to administer." Pet'r Minnesota Republican Party Br. at 34 (citing P. App. 44a).

As a result, the conscientious judge has no choice but to take care with campaign speech, being wary of even implying promises or commitments. Failure to do so would visit, in effect, either a fraud on the voters or a fraud on the office. The successful candidate, recognizing that a commitment has been made or perceived, cannot act on it without violating the obligation to rule without prejudice or commitment. Alternatively, the candidate may disregard the commitment, or the perception of it, leading the voters to conclude that they have been deceived.

States have responded to this dilemma with carefully drawn limitations on speech, but also with other measures intended to mitigate the effects of campaigning on judicial independence. All but four States with judicial elections bar personal fundraising and require that all fundraising be done by the candidate's campaign committee, in order to at least reduce the candidate's involvement in fundraising.[21] At least twenty-four States limit the time period during which fundraising is permitted, both before and after the election.[22] ABA Task Force Report, *supra*, at pt. 2, 47-48.

Recognizing the fundamental differences between judges and other officials that lie behind state limits on judicial candidate speech and conduct, the courts have grappled with the formulation of the appropriate constitutional standard. The court below adopted a narrowly tailored/compelling interest

[21] The four states are California, Texas, Idaho and Nevada. *See* ABA Task Force Report, *supra*, at 40-41 n.73.

[22] The pre-election window is one year in five states and shorter in eleven states, and the post-election window is six months or shorter in nineteen states. *Id.* at 48 n.2.

test. *See* P. App. 20a. Other courts, following this Court's analysis of Hatch Act prohibitions on public employees, *see Letter Carriers*, 413 U.S. 548, have adopted versions of the less stringent test articulated in that case. *See, e.g., Stretton*, 944 F.2d at 141 (construing the balance called for in *Letter Carriers* to require narrow tailoring to a compelling interest); *Morial*, 565 F.2d at 300 (interpreting *Letter Carriers* to require a "reasonable necessity ... to achieve a compelling public objective"); *see also Buckley*, 997 F.2d at 227-30 (stating no rule, but balancing the interests of the State and the candidates and examining the rule's fit to the State's interest).[23] Still another line of authority suggests that a lesser degree of scrutiny is appropriate when the speech in question implicates the fair administration of justice. *See Gentile v. State Bar*, 501 U.S. 1030, 1057 (1991); *see also Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 601 n.27 (1976) (Brennan, J., concurring) ("As officers of the court, court personnel and attorneys have a fiduciary responsibility not to engage in public debate that will ... obstruct the fair administration of justice."); *Bridges v. California*, 314 U.S. 252, 283 (1941) (Frankfurter, J., dissenting) ("[J]udges are restrained in their freedom of expression by historic compulsions resting on no other officials of government. They are so circumscribed precisely because judges have in their keeping the enforcement of rights and the protection of liberties which, according to the wisdom of the ages, can only be enforced and protected by observing such methods and traditions.").

The courts employing various constitutional tests are doing so, however, on the basis of a common conviction—that the judiciary's role is distinctive, and that it calls for special

[23] Subsequent cases have interpreted *Letter Carriers* in differing ways. Some, including *Snepp v. United States*, 444 U.S. 507, 509 n. 3 (1980), and *Brown v. Glines*, 444 U.S. 348, 355 (1980), suggest that the appropriate test is one requiring the restriction to be a reasonable means to protect a substantial state interest.

protections when judges become candidates for elective office. They agree also that reconciling electoral accountability with the judiciary's unique function, while a difficult task, is essential. *See, e.g., Buckley*, 997 F.2d at 227 ("only a fanatic would suppose that one of the principles should give way completely to the other"); *Morial*, 565 F.2d at 300 n.5 (noting that First Amendment candidacy jurisprudence is "difficult"); *ACLU v. Florida Bar*, 744 F. Supp. 1094, 1099 (N.D. Fla. 1990). At stake is the quality and principled administration of justice by state courts whose members, though required to stand for election, would remain faithful still to what this Court has termed "the ideal character of the judicial office." *Chisom*, 501 U.S. at 400.

2. *Any Standard for Judging Permissible Candidate Speech Must Take into Account the "Political Realities" of Modern Campaigns.*

In at least a few States, judicial elections in recent years have come increasingly to resemble legislative and executive contests in cost, intensity and style. *See* ABA Task Force Report, *supra*, at 13 n.25 ("The changes in judicial elections have been summed up as making them 'nastier, noisier and costlier.'" (citing Richard Woodbury, *Is Texas Justice for Sale?: The State's Top Judge Resigns to Fight for Reform*, Time, Jan. 11, 1988, at 74)); *see also* R. Darcy, *Conflict and Reform: Oklahoma Judicial Elections 1907-1998*, 26 Okla. City U.L. Rev. 519, 519 (Summer 2001). Any rule or standard fashioned to distinguish permissible from impermissible candidate campaign speech needs to take into account "political realities" in this sphere, as this Court has counseled in other cases involving campaign speech and activity. *See, e.g., Fed. Election Comm'n v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 477 (2001).

It is error to believe that campaign speech, like other speech, depends for its effectiveness on "spelling out" the intentions of the speaker. Much to the contrary, political tactics often favor

the concise, coded expressions that stop considerably short of full exposition. *See, e.g.,* Kathleen Hall Jameson, *Dirty Politics: Deception, Distraction and Democracy* 85 (1992) (noting common use of "code words, images, voices, or tones" used to "telegraph" a message). Political speech is frequently, and quite deliberately, suggestive rather than explicit, often cast into abbreviated "soundbite" form; and "a more sophisticated mixture of candidate-centered advocacy peppered with ambiguous issue references has long proved the most effective advertising strategy." David A. Pepper, *Recasting the Issue Ad: The Failure of the Court's Issue Advocacy Standards*, 100 W. Va. L. Rev. 141, 158 (1997).

One cause for the continued controversy over the announce clause is that while the constitutional issues are apparent, so are the means by which such "announcements" on "general issues" provide, in the medium of political speech, ample room for the communication of commitments. It matters less how many words are used, and how precisely, and more what is intended by the speaker and fully understood by the audience. This attention to intention and to context may not pass muster with courts in cases involving legislative campaign finance, *see, e.g., Fed. Election Comm'n v. Christian Action Network*, 894 F. Supp. 946, 957-58 (W.D. Va. 1995), *aff'd*, 1996 U.S. App. LEXIS 19047 (4th Cir. Aug. 2, 1996), but it is vital in understanding the challenges of judicial campaigning for an independent, impartial judiciary.

As the Court resolves the issue presented in this case, it is urged to do so with careful attention to the difficulties presented by candidate campaign speech—even on "issues"—for an independent and impartial judiciary. In their efforts to address this problem, the States are addressing a real and urgent one of

separating out informative speech from the kind, no less typical of campaigns, intended to communicate commitments.[24]

3. *The Court's Increased Role in the Adjudication of Prominent Issues Also Before the Legislature and Executive Justifies Clear and Reasonable Regulations of Judicial Campaign Speech.*

The issue before this Court arises at a time in the country's history when state and federal courts consider the widest range of controversial issues in American politics and society. *See, e.g., Morial*, 565 F.2d at 302 ("Ours is an era in which members of the judiciary often are called upon to adjudicate cases squarely presenting hotly contested social or political issues."); *Buckley*, 997 F.2d at 229 ("There is almost no legal or political issue that is unlikely to come before a judge of an American court, state or federal, of general jurisdiction."). These same issues—reproductive rights, gun control, the regulation of tobacco, affirmative action, and others—also occupy center-stage in the political process and in the legislatures. *See, e.g., Sampson v. State*, 31 P.3d 88, 98 (Alaska 2001) (rejecting a claim that the Alaska Constitution implies a right to physician-assisted suicide); *Hilly v. Portland*, 582 A.2d 1213, 1215 (Me. 1990) (reviewing the constitutionality of a statute requiring a permit for the carrying of a concealed weapon); *Pro-Choice Miss. v. Fordice*, 716 So.2d 645, 649 (Miss. 1998) (reviewing a claim that certain statutory restrictions on abortion are unconstitutional);

[24] It is not correct that attempts to limit commitments are necessarily frustrated—or rendered fatally inconsistent—by the right of "judges or prospective judges" to take positions in "judicial opinions, legal briefs or arguments, law review articles, op-ed pieces, books, or speeches that predate the declaration of candidacy." Public Citizen Br. at 13. There is little danger that legal scholarship will be confused with campaign statements, that the two will have similar effects on potential voters, or even that the audience for the one is the same as for the other.

Baker v. State, 744 A.2d 864, 886 (Vt. 2000) (asserting that the Vermont Constitution mandates extension of state marriage laws to same-sex couples).

An elected court in particular must avoid the perception or the possibility that its members, having campaigned on such issues, may be pressed to act more like elected legislators than judges in resolving them. Here the danger is not, as previously discussed, that courts will be unable to check the legislature, but that they will be unable, under the pressures of the campaign trail, to check themselves, and will intrude into the prerogatives and methods of the other branches.

This check can be accomplished only by judges who review and decide their cases as judges—by using the tools of their craft. Those include an unrelenting focus on the facts and the law, and the conduct of careful legal analysis presented clearly and with integrity in opinions and orders. Justice Cardozo, who was elected with party endorsement to judicial office in New York, expressed the nature of the judicial function in these terms:

> [A]n important distinction separates . . . judicial from legislative activity. . . . [T]he judge . . . ought, in adherence to the spirit of our modern organization, and in order to escape the dangers of arbitrary action, to disengage himself, so far as possible, of every influence that is personal or that comes from the particular situation which is presented to him, and base his judicial decision on elements of an objective nature.

Benjamin Cardozo, *The Nature of the Judicial Process* 120-121 (1921).

Full engagement with the electorate as a political candidate necessarily places severe strains on fidelity to these principles. Yet these are the core principles which define—and limit—the participation of judges in the controversial issues of the day.

CONCLUSION

Amicus curiae, Conference of Chief Justices, respectfully requests that this Court affirm the decision of the Eighth Circuit insofar as it acknowledges the constitutional basis for allowing States, when considering limits on judicial candidate speech, to balance First Amendment concerns against the guarantees of the Due Process Clause and the role of an independent judiciary under our constitutional scheme of separated powers.

Respectfully Submitted,

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APPENDIX

STATES AND THE TYPES OF JUDICIAL ELECTIONS FOR SOME OR ALL OF THEIR JUDGES (Underlined states have different judges facing different types of elections.)

PARTISAN*	RETENTION**	NON-PARTISAN	NO JUDICIAL ELECTIONS***
Alabama	Alaska	Arkansas	Connecticut
Idaho	Arizona	Arizona	Delaware
Illinois	California	California	Hawaii
Indiana	Colorado	Florida	Massachusetts
Kansas	Florida	Georgia	Maine
Louisiana	Illinois	Idaho	New Hampshire
Michigan	Indiana	Indiana	New Jersey
Missouri	Iowa	Kentucky	Rhode Island
New Mexico	Kansas	Maryland	South Carolina
New York	Maryland	Minnesota	Vermont
North Carolina	Missouri	Mississippi	Virginia
Ohio	Nebraska	Montana	
Pennsylvania	New Mexico	Nevada	
Tennessee	Oklahoma	North Carolina	
Texas	Pennsylvania	North Dakota	
West Virginia	South Dakota	Oklahoma	
	Tennessee	Oregon	
	Utah	South Dakota	
	Wyoming	Washington	
		Wisconsin	

* In Michigan and Ohio (and recently for the Idaho Supreme Court) judicial candidates appear on the general election ballot without party labels, but their selection and campaigns are otherwise partisan.

** In Illinois, New Mexico, and Pennsylvania judges are initially elected in partisan elections, but their continuance is determined in retention elections; New Mexico has a uniquely hybrid process.

*** Included here are Connecticut, Maine, South Carolina and Vermont, which elect probate judges. Except for this note, this Table includes only appellate and general-jurisdiction trial judges.